



# Information Law: Cases and Materials

## Volume Three

Professor Lisa M. Austin  
Faculty of Law, University of Toronto  
Winter 2005

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## Notes

### Duty to warn

In *Tarasoff v Regents of the University of California*, 551 P.2d 334 (Cal. 1976), the California Supreme Court held that a therapist has a duty to use reasonable care to protect the intended victim of their patient where that patient presents a serious danger of violence to another. This duty may include the duty to warn the intended victim, or to notify the police. Subsequent cases have indicated that the duty of care will only hold in cases where there are specific threats and particular foreseeable victims: *Thompson v County of Alameda*, 614 P.2d 728 (Cal. 1980).

Tarasoff was very controversially extended in *Safer v Estate of Pack*, 677 A.2d 1188 (N.J. Sup. Ct. Div. 1996) to include “a physician’s duty to warn those known to be at risk of avoidable harm from a genetically transmissible condition.”

In *Wenden v. Trikha*, [1991] A.J. No. 612 (Alta. Q.B.), the plaintiff sued the defendant’s psychiatrist and hospital, in addition to the defendant, for injuries sustained in a car accident that occurred when the defendant drove out of the hospital at high speed after voluntarily admitting himself as a patient. Murray J. held that

both a hospital and a psychiatrist who becomes aware that a patient presents a serious danger to the well-being of a third party or parties owe a duty to take reasonable steps to protect such a person or persons if the requisite proximity of relationship exists between them. ... I have no doubt that the psychiatrist in Tarasoff owed such a duty to Tatiana Tarasoff. She was clearly the person who was exposed to a particular risk of danger and harm from Poddar. However ... whether or not a person or persons fall within the necessary category will depend upon the particular nature of the risk posed by the patient, the predictability of future behaviour giving rise to the risk, and the ability to identify the person or class of persons at risk. The standard of care in determining whether or not action should be taken by a psychiatrist to protect the person or class of persons and, if so, what should be done, is as stated by the majority in Tarasoff: "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances." In saying this, I am cognizant of the question of patient and physician confidentiality and other problems it may pose for the psychiatric profession which are well documented in the minority judgment in Tarasoff.

While not addressing the question of a duty to warn, the Supreme Court of Canada has held that danger to public safety can justify an exception to solicitor-client privilege: *Smith v Jones*, [1999] 1 S.C.R. 145. Three factors need to be taken into account: 1) is there a clear risk to an identifiable persons or group of persons? 2) Is there a risk of serious bodily harm or death? 3) Is the danger imminent?

## Notes

### 1) Tort of Invasion of Privacy in Canadian Common Law

In *Saccone v Orr* (1981), 34 O.R. (2d) 317, an Ontario County Court decision, the plaintiff brought a suit against the defendant for broadcasting recorded conversations at a municipal meeting after the plaintiff has instructed the defendant not to play the recording in public. The court found the plaintiff required some right of recovery and “for want of a better description” the circumstances before the court were an invasion of privacy. The court went on to award damages in the amount of \$500.00 plus costs. The tort of invasion of privacy was also found actionable in a case decided by another Ontario court. In *Roth v Roth* (1991), 4 O.R. (3d) 740, a dispute over access to a road disintegrated into the defendant blocking the plaintiff’s access to the road entirely. The defendant’s objectionable conduct was found to be actionable as an invasion of privacy based on circumstances of the case, which were much more analogous to nuisance.

Several provinces have legislation that provide for a statutory tort of invasion of privacy. These include British Columbia (*Privacy Act* R.S.B.C. 1979, c.336), Manitoba (*The Privacy Act* R.S.M. 1987, c. P125), Newfoundland (*Privacy Act* R.S.N. 1990 c. P22) and Saskatchewan (*The Privacy Act* R.S.S. 1978 c. P-24). In addition, s. 5 of Quebec’s *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. guarantees everyone the “right to respect for his private life”.

### 2) Breach of Confidentiality in Canadian Law

The Canadian law regarding breach of confidentiality largely follows the approach in the United Kingdom although no case has considered recent developments as outlined in cases such as *Campbell*. The leading Canadian cases are *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] S.C.R. 254 and *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142.

### 3) Tort of Invasion of Privacy in New Zealand

The New Zealand Court of Appeal has recently recognized the tort of invasion of privacy in so far as it applies to the publication of privacy facts. In *Hosking v Runting* [unreported decision of the Court of Appeal], 101/03. (CA March 25, 2004 ), the Court held that there was a tort of invasion of privacy in New Zealand, but that it did not apply to the facts of the case. The case concerned the publication of photos taken of the appellants’ 18 month-old twins while they were being pushed in a baby carriage in a public street. The appellants were considered a “celebrity couple” in New Zealand.

### 3) Publicity Rights and Misappropriation of Personality

The branch of the tort of invasion of privacy that protects from the appropriation of one’s name or likeness is similar to the “right to publicity”, which has also been protected by the courts. The law’s treatment of the right to publicity varies significantly between

states and ranges from statutory protection to recognition at common law. In addition, the "right to publicity" has been treated as a form of property with the misappropriation being defined as a form of unfair competition. Courts' treatment of the right to publicity depends on the characterization of the right, with concepts of dignity prevailing under privacy and proof of exploitation and transfer rights remaining at issue when the right is considered in terms of property.

The right to publicity has given rise to a number of cases in the United States involving celebrities. In *White v. Samsung Electronics America Inc. and David Deutch Associates*, 1992 U.S. App. Lexis 17205, plaintiff Vanna White, the well-known game-show hostess, sued Samsung and its marketer, Deutch, for an ad depicting a robot in a blonde wig, dress and large jewelry on a set resembling the Wheel of Fortune game show set above the caption "Longest running game show 2012 A.D.". The court found that the ad had appropriated Ms. White's identity thereby violating her right to publicity. In addition, the court found that the ad created potential consumer confusion as to the plaintiff's endorsement of the product under the  *Lanham Act* and awarded damages to Ms. White. *Carson v. Here's Johnny Portable Toilets*, 698 F. 2d 831 (6<sup>th</sup> Cir. 1983) centered on the defendant company's use of the well-known variety show host's signature entrance tag. While the court held that there was no confusion as to Mr. Carson's possible endorsement of the portable toilets, the company did violate the night show host's publicity rights, notwithstanding that the advertisement did not employ his name or likeness.

In Canada, the tort of misappropriation of personality was recognized in *Krouse v. Chrysler Canada*, 1 O.R. (2d) 225 (C.A. 1974) where Estey J. wrote that the law "does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality". In *Krouse*, Chrysler had included an action shot of a Hamilton Tiger Cat football game on its promotional team identification "Spotter". In the photograph, only Krouse's number was visible and he brought the suit against Chrysler alleging that the defendant had used his image and personality to its commercial advantage. The court found that the photograph was being used legally and that as professional athletes, football players must be accustomed to a certain degree of publicity. In addition, the photograph does not lead to any possible consumer misunderstanding concerning Krouse's unauthorized endorsement of Chrysler. While the court found that the suit gave rise to a new cause of action, that is the misappropriation of personality, it did not find that Chrysler had misappropriated Krouse's image in the facts of the case.

Following *Krouse*, the court endorsed the tort of misappropriation of personality in *Athans v. Canadian Adventure Camps*, 17 O.R. (2d) 425 (H.C. 1977). George Athans was a world-class water-skier who marketed his image using a particular pose. The defendant employed one of Athans's photographs to sketch a picture of a water-skier for its promotional brochure and Athans sued for misappropriation of his personality, asserting that the sketch was recognizable as his marketable image. While the court found that it was unlikely that readers of the brochure would either recognize Athans or infer his association with the camp, the defendants *did* use his image for commercial purposes and therefore misappropriated his personality.

In a more recent case, *Gould Estate v Stoddard Publishing Co.*, 30 O.R. (3d) 520 (G.D. 1996) the court found that in interpreting the tort of misappropriation of personality, there's a distinction between material used for sales and material used as subject in the

public interest. In *Gould*, the defendant had published a book using photographs and conversations originating with a reporter's interview with Glenn Gould early in his career. While the materials were originally intended and used for a magazine article, the author included them in the contentious book years after Gould had died. Turning to American and Canadian jurisprudence, the court found that the tort of misappropriation of personality has limits set by the conflicting right to freedom of expression and the balance falls along the sales vs. subject divide. If the use of the plaintiff's identity is for the commercial advantage of the defendant, the actions fall within the ambit of the tort; whereas, when the use is the *subject* of the work in question, such as a biography, the public interest in freedom of expression and access to information on relevant public and social issues takes precedence. In *Gould*, the defendant had Gould's permission in the creation of the materials at issue and "there is public interest in knowing more about one of Canada's musical geniuses". The court held that the materials' use in the retrospective book does not give rise to the tort of misappropriation of personality.

#### **4) Breach of Confidentiality and Anonymous Information**

*Regina v Department of Health ex parte. Source Informatics Inc.* [2001] QB 424, concerned the trade in anonymized prescription information originating from health practitioners. The applicant, Source, was engaged in the practice of collecting and reselling information from doctors and pharmacists on the types of drugs being prescribed and dispensed. The Department of Health had issued a policy document declaring the process an illegal breach of patient's confidence and it is the declarations in this document that were being contested. The court was faced with the issue of whether or not a pharmacist would breach his or her "undoubted duty of confidentiality to a patient if, having duly dispensed the medicine prescribed, he [or she] then uses the prescription form as the means of selling anonymized information to Source?"

Source had argued that the three elements of breach of confidentiality, that is that the information imparted be of a confidential nature, that the information must have been shared in circumstances giving rise to an obligation of confidence and finally that the misuse of the information had been to the detriment of the party who communicated it, were not applicable. It suggested that the patients did not have any confidence in anonymised information, that selling did not involve a misuse and that there was no detriment to patients because of the activity. The Department of Health, on the other hand, argued that a patient "is entitled to keep his ailments to himself" and that prescription information is imparted solely with the purpose to dispense medicine and therefore the activities of Source are against public policy.

In determining the outcome, the court first asked: what is the interest at stake or "what is the law here concerned to protect"? After determining that the law exists to protect the confider's personal privacy, the court found that the patient had no proprietary information in the prescription and so long as his or her personal privacy is protected, the pharmacists' subsequent sharing of the information does not pose a problem. The court suggested that should the Department of Health continue to find the procedure against public policy, it should seek a solution outside of the law of breach of confidence as the selling of anonymised prescription data involves no breach of duty owed by the pharmacists.

## 5) Employment Contracts and Confidential Information

Employers have a valid interest in protecting their confidential business information and trade secrets and this is increasingly important given the value of information in the knowledge-based economy. While this interest can be protected through non-disclosure and non-compete clauses in employment contracts, the nature of the high-tech and knowledge-based economy makes the practicality and enforcement of these covenants problematic. Separating trade secrets from learned employee skills and general industry knowledge becomes problematic. To further complicate this evolving area of law, companies have a conflicting interest in ensuring that their future employees are not unduly restricted by similar restrictive clauses in their prior employment contracts.

In the United States, treatment of non-disclosure clauses and restrictive covenants differs state by state. In general, restrictive covenants are not favoured, as they are viewed as restricting an individual's opportunity to pursue his or her livelihood; however, treatment depends on how the court views the reasonableness of the restrictions.

Earlier conceptions of reasonableness might not fit the bill in the new high-tech industry. To illustrate, in a 1999 New York case, *Earthweb Inc. v Schlack*, 71 F. Supp. 2d 299 (1999), the court held that a one year non-compete covenant was too restrictive "given the nature of this industry, its lack of geographical borders, and Schlack's former cutting-edge position with Earthweb where his success depended on keeping abreast of daily changes in content on the Internet." While the court in *Earthweb* refused to redraft the contract given its overly broad restrictions, judicial suggestions of six months have been deemed appropriate for high-tech and Internet-based industries: *DoubleClick v. Henderson* 1997 WL 731413 (N.Y. Supp. 1997). The court also refused to grant an injunction against Schlack based on the doctrine of inevitable disclosure, a controversial and recently emerging tool to cope with trade secret law in the new economy.

As with non-compete clauses, application of the trade secret law tool of the non-disclosure clause is far from uniform. Many states have adopted the *Uniform Trade Secrets Act (UTSA)* as a model for trade secret protection. The Act defines the elements of a trade secret and the circumstances when confidential business information has been misappropriated such that it is actionable; however, interpretation of the Act differs between states. Many states protect against actual and threatened disclosure of trade secrets, but there is a middle-ground that has been called "inevitable disclosure". Notably applied in the 1995 case, *Pepsi Co. Inc v Redmond*, 54 F.3d 1262, 1264 (7<sup>th</sup> Cir. 1995), the doctrine of inevitable disclosure acts as a restrictive covenant under which former employers seek to restrict employees' future employment with competitors where their participation in the new company would automatically involve the disclosure of confidential information; in short, the argument is that you cannot erase what you know or have learned just because a contract says you must. While the doctrine has produced some favourable responses from academic and legal writers, it has generally not been upheld. In *Earthweb*, the court held that "the inevitable disclosure doctrine treads an exceedingly narrow path through judicially disfavoured territory. Absent evidence of actual misappropriation by an employee, the doctrine should be applied in only the rarest of cases". In a recent New York case, the court did not recognize the doctrine of inevitable disclosure and refused to restrict the former employee to "an implied-in-fact restrictive covenant not to compete": *Marietta Corp. v Fairhurst* 2002 WL 31898398. While the doctrine would appear to offer a solution to businesses' interests in protecting confidential information in the face of an increasingly

mobile and highly information-dependent workforce, its future remains to be definitively determined.





have laid down in terms that, unless the plaintiff in an action for nuisance has legal interest in the land which is alleged to be affected by the nuisance, he has no cause of action.

For myself, I do not read Malone v. Laskey as being so explicit. The judgments did not recognize any right of occupancy by the husband as against the tenant Witherby & Co., and of course his wife would be in no better position. In the ease at bar the brother is, as I infer, the owner of the premises he occupies with his wife, the sister-in-law, and their family,

There is authority that a claim in nuisance is not necessarily restricted to an occupier who has some legally demonstrable and enforceable right of occupation. In *Foster v. Warblington Urban Council*, [1906] 1 K.B. 648, a substantial de facto occupation was recognized as sufficient. There, the plaintiff sued on nuisance affecting his oyster pond which he had used for many years for the storage of oysters. There was much controversy over his legal right of occupancy, and after discussing this Vaughan Williams, L.J., said at pp. 659-60:

But, even if title could not be proved, in my judgment there has been such an occupation of these beds for such a length of time -- not that the length of time is really material for this purpose -- as would entitle the plaintiff as against the defendants, who have no interest in the foreshore, to sustain this action for the injury which it is alleged has been done by the sewage to his oysters so kept in those beds.

Thus, a distinction is drawn between one who is "merely present" and occupancy of a substantial nature. In the latter case it is the fact of the occupation that supports the action, although admittedly the legal aspect of an occupation may well have an influence on the conclusion. I would not think trespass, even if persisted in, would ground an action in nuisance.

Here we have a wife harassed in the matrimonial home. She has a status, a right to live there with her husband and children. I find it absurd to say that her occupancy of the matrimonial home is insufficient to found an action in nuisance. In my opinion she is entitled to the same relief as is her husband, the brother.

As to the unwanted mail, the evidence does not show that the plaintiffs have been unduly disturbed in their enjoyment of their respective premises. In such circumstances, to discuss further the use of the mails as a possible vehicle of harassment would be only obiter.

In the result the judgment roll should be varied by limiting para. 2(b) to harassment by telephone, and by personal contact which I take it refers to trespass to the person. Undoubtedly the major point in the appeal is invasion of privacy by telephone communications, and the appellant has failed on this issue. I would dismiss the appeal, save as to the variation above noted in the judgment roll, with costs to the respondents on the fifth column.

Appeals dismissed, with variations of trial judgments.

## Notes

## 1) Anti-Spam Bill

Bill S-15, "An Act to prevent unsolicited messages on the Internet," has been through first reading in the Canadian Senate, provides for initiatives aimed at controlling Spam email. Its summary reads as follows:

This enactment provides for initiatives to control spam on the Internet.

It requires the Minister of Industry to initiate international consultation with other governments and report annually to Parliament on progress.

It allows the Minister to establish an Internet Consumer Protection Council or designate an existing body to fulfill the role of the Council. The Council will set standards for its members and for procedures to be used to reduce spam. No person may operate an Internet service provider business without being a member of the Council. If the Minister is not satisfied with the Council's operation, the Minister may appoint directors and pass by-laws to administer it.

Any person may give a notice, to the Minister or the body to which the Minister delegates the responsibility, that they wish to be on a "no-spam list", and persons sending spam must first check to see if the address is on the "no-spam list". The list will not be a public document and the Minister will only provide information as to whether an address is or is not on the list.

The enactment makes it an offence to send spam to a person whose address is on the "no-spam list". However, the recipient must file a complaint with the Minister before any proceedings may be instituted.

Wherever a message is initiated, if it is received by a person in Canada it is deemed to have been sent to that person, and the act of sending it is deemed to have been carried out in Canada.

The enactment provides for offences and punishments that are more severe in respect of messages that involve pornography, explicit sexual activity or attempted fraud or that target children as receivers.

It establishes a cause of civil action in nuisance for sending excessive spam and deems damage to have been caused if the volume is sufficient to cause inconvenience.

The nuisance clause reads as follows:

17. (1) Any person, including an Internet service provider, who receives spam in contravention of this Act in quantities that cause significant inconvenience may bring an action in nuisance in a court of competent jurisdiction against the sender, for damages or any other relief the court considers appropriate, including an injunction.

(2) A person who receives spam in quantities that, in the opinion of the court, causes significant inconvenience, is deemed to have suffered damage without it

being specifically proved, and the court may award both general and punitive damages.

## 2) U.S. Anti-Spam Efforts

Over 38 states have enacted anti-Spam legislation to date; however, many of these statutes will have provisions that are pre-empted by the new federal CAN-SPAM Act of 2003, which is an acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing". The Bill was signed by President Bush on December 16<sup>th</sup>, 2003 and went into effect on January 1<sup>st</sup>, 2004. The legislation authorizes, although does not require, a "do not mail" registry similar to the "do not call" registry already in operation in the U.S. and criminalizes the common practice of falsifying subject lines of spam in order to trick people into opening the text of the email.

While the Bill received almost unanimous approval before the House of Representatives, not all groups are as thrilled with the CAN-SPAM Act. Several net-groups are critical of the Act's pre-emption of stricter state legislative regimes. For example, in California, individuals could participate in the process by investigating and filing a complaint to be pursued through the Federal Trade Commission (FTC) and this process is currently not afforded by the CAN-SPAM Act. In addition, the Act has been criticized as not being strong enough—as of the beginning of January, the media was reporting that spam in email inboxes was not abating. Critics of the Bill assert that regulation of unsolicited email is insufficient and only a prohibition will produce any noticeable change in the hundreds unwanted emails in peoples' inboxes.

## 3) Do Not Call Registries

The National Do Not Call Registry is an American program aimed at limiting annoying calls from telemarketers. The program is managed by the Federal Trade Commission (FTC), the American agency responsible for consumer protection. Its operation is fairly simple: once a telephone number has been registered (which is done for free online or through the telephone) telemarketers calls should cease after three months, which is presumably the time for the telephone number to filter through the administration of the program to those making the calls. If calls continue past this date, consumers are encouraged to file complaints either online or through the toll-free telephone numbers. These complaints are then handled by the FTC, the Federal Communications Commission or appropriate state authorities.

As would be expected, telemarketers were not pleased with the government's efforts with the program and sought redress through the courts. On November 11<sup>th</sup>, 2003, the U.S. Court of Appeals for the Tenth Circuit heard a consolidated appeal from decisions by lower court judges that ruled against the FTC's registry (*Mainstream Marketing Services v FTC*). At issue was the constitutionality of the registry and the basic fairness of the plan that allowed political and charity calls but excluded commercial telemarketing. The suit was brought by a group of telemarketers alleging that the registry violates their First Amendment rights. The Court upheld the constitutionality of the registry.

In Canada, there is a private Do Not Call registry operated by the Canadian Marketing Association (CMA), an industry-based trade association. Consumers can register their telephone numbers with the CMA and its members are obligated to comply

with the limitations of the registry with their telephone marketing efforts. Of course, membership in the organization is not mandatory and compliance is enforced only through the CMA, so this registry will not likely be as effective as the American government efforts.

#### 4) 1267623 Ontario Inc. v Nexx Online Inc [1999] O.J. No. 2246

The case involves an alleged breach of contract over provision of internet services between the plaintiff, an online marketer and the defendant, an internet services provider. The two parties entered into a contract in which the defendant agreed to provide internet services to the plaintiff; however, when the plaintiff began to engage in sending bulk email, or "spam", the defendant instructed the plaintiff to stop the practice or the service would cease. When the plaintiff continued to send bulk email, the defendant disconnected the defendant's internet. The plaintiff brought a motion for interlocutory injunction requiring the defendant to continue to provide internet service.

The court dismissed the motion. The contract provided that the plaintiff "agrees to follow generally accepted 'Netiquette' when sending email messages...". Wilson J. defined Netiquette as "as the growing body of acceptable, though as yet largely unwritten, etiquette with respect to conduct by users of the Internet". While bulk email is not specifically prohibited by Netiquette, few internet service providers allow bulk email and in the U.S. anti-Spam legislation is increasingly common. Accordingly, the court found that unsolicited bulk email was against the emerging principles of Netiquette, unless directly provided for in the contract.



